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IN THE

## Supreme Court of the United States

OCTOBER TERM, 1945

No. [REDACTED]

**121**

MARIE COOPER DIECKHAUS,

*Plaintiff-Petitioner,*

*against*

TWENTIETH CENTURY-FOX FILM  
CORPORATION,

*Defendant.*

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### DEFENDANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 17, 1946.

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*Plaintiff-Petitioner,*  
*against*  
TWENTIETH CENTURY-FOX FILM  
CORPORATION,  
*Defendant.*

**DEFENDANT'S BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

There is no occasion for this Court to exercise its discretionary power to review this private litigation. Jurisdiction in the District Court was solely by reason of diversity of citizenship; no federal statute, no federal question nor any novel question of law is involved.

The plaintiff, a resident of St. Louis, is the alleged authoress of an unpublished manuscript variously entitled "Love Girl", "Twisted Hearts" and the "St. Louis Paganini".

The defendant, a New York corporation, is the producer of the motion picture "Alexander's Ragtime Band" which

starred Alice Faye and Tyrone Power and served as a vehicle for the singing and playing of twenty-eight of Irving Berlin's great songs, including "Alexander's Ragtime Band", "Oh, How I Hate to Get Up in The Morning", "Remember" and "All Alone".

The idea for defendant's motion picture was conceived by its production head, Darryl Zanuck, in the fall of 1936. He talked to Irving Berlin about a picture which would serve as a vehicle for Berlin's songs (R. 385). Berlin agreed, provided the picture be not biographical (R. 386, 398, 421, 423, 1238) and his suggestion was that the picture should tell a story of American jazz music in terms of a band leader (R. 409, 424). Berlin prepared a story outline (Exhibit T) which was completed and typed in October, 1936 (R. 407, 410). That outline is entitled "Alexander's Ragtime Band" and is the story of Alexander and his jazz band. The synopsis of that outline which is incorporated in the opinion of the Circuit Court of Appeals demonstrates that it is the origin and basis of the motion picture.

The Berlin outline was expanded into a treatment prepared by Berlin and Richard Sherman, a well-known writer. They worked for three months and their draft was mimeographed by March 3, 1937. Sheridan Gibney, Lamar Trott, Kathryn Scola, writers, Harry Joe Brown, the producer, and Henry King, the director, all worked on the script. Darryl Zanuck, the production head, participated in numerous story conferences and contributed much to the dramatic power of the story. Photography began in December of 1937, there was a premiere in Los Angeles in May, 1938, and the picture was first shown in St. Louis in August, 1938.

On May 7, 1941, plaintiff brought this suit charging that defendant copied from her unpublished novel "Love Girl" in making its motion picture.

The origin of plaintiff's novel is obscure. She says she began to write it in 1925 (R. 112, 114, 211). By January of 1934, she had two copies of a manuscript which she sent to Washington under the title "Love Girl". They were returned; the manuscript not being published the claim of copyright could not be registered.

In 1934 plaintiff had Mrs. Mabel Malone, a local writer, read and criticize the manuscript then extant, but this manuscript was not produced at the trial. During the next three years the manuscript was in plaintiff's possession and in St. Louis. There were further revisions and much re-typing.

About January 24, 1937\*, plaintiff sent a typed copy of a manuscript to Mr. Laurence D'Orsay, a literary agent and critic in Los Angeles who had no connection or acquaintance with defendant or any of its employees. He kept it for some time and returned it to her not later than May 8, 1937, with an extensive letter of criticism. What she sent him she apparently thereafter revised extensively. At any rate, what she produced when her deposition was taken in 1941, was in great disarray (R. 62, 148, 149, 170) and contains more than 2500 changes from the original typing (R. 1624).

The trial in December, 1942, and January, 1943, was devoted largely to reading depositions. The District Court announced its opinion in favor of plaintiff in March, 1944.

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\*Three months after Irving Berlin's outline (Ex. T) had been finished.

On June 28, 1944, defendant filed its motion to reo<sup>n</sup>n the proceedings for additional testimony, and presented<sup>agent</sup> evidence that plaintiff had practiced fraud on the Cot and the defendant in her documentary evidence. Plaintiff's counsel resisted the charge and did not then seek e<sup>n</sup>eration. On December 29, 1944, the Court overruled the motion without opinion, and on the same day sigd the findings of fact which were prepared by plaintiff's attorney before the motion to reopen had been made. Thereafter, defendant's timely motion for a new trial was denied, its request for findings rejected, and its criticism of the plaintiff's findings ignored.

The Circuit Court of Appeals reversed and denied judgment dismissing the complaint. Judge Johns, dissenting, would have reversed the judgment and remanded the case for trial and findings on the issue of fraud. A motion for reargument was denied.

## ARGUMENT

### **FIRST: THE CIRCUIT COURT OF APPEAL CORRECTLY APPLIED THE MISSOURI LAW.**

Jurisdiction being based solely on diversity, the plaintiff's manuscript being unpublished, the Missouri law applied. There being no authoritative statement<sup>t</sup> that Missouri law, the Court quite correctly determined from its own research what it anticipated the Supreme Court of Missouri would do in a like case.

In defendant's brief in the Circuit Court of Appeals, it stated (p. 39):

"Since jurisdiction in this case is dependent solely on diversity of citizenship, it being explicit

that plaintiff has no claim under the Copyright Laws of the United States, the District Court should have determined and applied the Missouri law.

\* \* \*

"We assume that if the Supreme Court of Missouri were faced with this record it would select from the vast bibliography available the most cogent, well reasoned and convincing authorities as its guide in formulating the Missouri law."

This is exactly what the Circuit Court of Appeals did, saying [R. 2037] :

"Although this action is brought in Missouri under the laws of that state and not for infringement of federal copyright, the law to be applied to it is found in the very numerous federal decisions which have fully expounded the origins, principles and philosophy governing the ascertainment, definition and protection of the right of property in literary productions, and there is nothing in any Missouri decision in conflict therewith. The District court relied upon them. More than two hundred of the decisions have been brought to our attention by the diligence of able counsel and we have considered them."

The Circuit Court did not, as is now charged, ignore the uniform holdings of other courts in formulating its decision.

In *Ruhlin v. N. Y. Life Ins. Co.*, 304 U. S. 202 (1938), this Court indicated that it would not ordinarily grant certiorari to review a decision of a Circuit Court of Appeals on general state law.

**SECOND: THE CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THE ISSUE OF ACCESS.**

There was no testimony by anyone that any employee of the defendant had ever seen or read or copied from plaintiff's manuscript. Everyone connected with the production of the motion picture testified that he never saw or read plaintiff's manuscript and did not copy therefrom.

The unsupported suggestion that defendant might have had access through Mrs. Malone, who had some manuscript of plaintiffs for a few days in 1934, is simply fantastic. Mrs. Malone categorically denied telling anyone at Twentieth Century-Fox anything about the novel. She knew no one at Twentieth Century-Fox. No one at Twentieth Century-Fox knew Mrs. Malone. The plaintiff's gratuitous suggestion that Mrs. Malone testified falsely is not proof of access.

Mr. D'Orsay, plaintiff's literary agent, testified categorically he knew no one at Twentieth Century-Fox and had never disclosed the contents of plaintiff's manuscript to anyone at Twentieth Century-Fox (R. 342-344, 347, 353). No one at Twentieth Century-Fox knew Mr. D'Orsay or learned anything about the plaintiff's manuscript from him (R. 385, 406, 1218, 1236, 1250, 1268, 1312, 1356, 1383). Again, speculation that Mr. D'Orsay lied or that one of his employees could have copied the manuscript and given it to some unidentified person at Twentieth Century-Fox is not proof of access. Not even the District Court placed any reliance upon the "possibility" of access through these facts (R. 1431-1432):

"The foregoing facts prove no more than that the manuscript was temporarily out of plaintiff's control and was in Hollywood, the same city in

which defendant's employees carried on their endeavors. We certainly cannot infer from this alone that defendant's employees had access to plaintiff's novel for the purpose of copying."

In the light of this record, the Circuit Court of Appeals held (R. 2036-2038) :

"The oral and documentary evidence in the record therefore establishes the fact that the defendant had no access to plaintiff's book, unless the law of plagiarism permits the court to draw an inference contrary to such proof from its finding of similarities on comparison of the book with the picture.

\* \* \* \*

"But we are equally convinced that the law of plagiarism has never been declared to sanction a determination of access upon a finding of mere similarities like those here involved in the face of such probative evidence of independent origination and of non access as appears in this record. There is no question here of comparison disclosing any co-existing identities of substantial originated matter in the book 'Love Girl' and the musical production 'Alexander's Ragtime Band'. The book is laid in part in the same period as the picture but it is about the loves of the love girl and her several lovers and there is no note of music in it. The picture's real interest and value as to every scene and action in it are in the music."

This case does not present the question which plaintiff urges was incorrectly decided,—Whether the fact of access may be proved by circumstantial evidence, including inferences from unexplained similarities, in face of direct evidence to the contrary by the defendant.

The plaintiff refers this Court to decisions in other Circuits where identities in musical phrases or striking similarities in expression have been said to have probative force on the issue of access. The alleged similarities here are trivial and, under the doctrine announced in the authorities cited by plaintiff, they have no probative value at all in law. The Circuit Court said (R. 2040-2041):

"A number of plagiarism cases that have turned in the accuser's favor upon the comparison between the accused and the accuser's composition have been cases where there was access and where the identities or very great similarities were in original copyrighted matter of substantial importance in the accuser's work which we find lacking here, and even in those cases we find none analogous to the situation here where the fact of non access has been established by evidence of witnesses and documents which exclude all reasonable probability of access and leave only the bare possibility that all the witnesses intentionally swore falsely upon the matter of access of which they had full knowledge.

"After all the long study of the plagiarism cases we must come back to recognition that the question in this case is simply whether the circumstantial evidence of the comparison from which one fair reader may draw one inference and another fair reader another, and neither can do more than speculate or suspect, can be held to sustain the plaintiff's burden to prove access and copying against the direct evidence of credible unimpeached witnesses and unquestioned documents that there was no access."

Here, there simply is no evidence at all, direct or circumstantial, that anyone in the defendant's employ ever saw, much less copied from, plaintiff's manuscript. We

believe on this record the Supreme Court of Missouri would have so held and that the Circuit Court properly so held.

**THIRD: THE CIRCUIT COURT OF APPEALS DID NOT MISINTERPRET THE MISSOURI OR GENERAL LAW AS TO MATTERS IN THE PUBLIC DOMAIN BEING A DEFENSE TO PLAGIARISM.**

The third question, which plaintiff suggests is presented here, is thus stated (Petition, p. 4):

"3. Whether, in a suit for common law copyright infringement, public domain constitutes a defense to the charge of literary piracy, if defendant fails to establish that the subject matter involved was taken from sources in the public domain and not from plaintiff's work."

No such question is presented.

As we understand it, if one resorts to matters in the public domain and writes an original arrangement or expression of matters there found, he becomes an author and has a property right in his original arrangement or expression.\* Another may go to same matters in the public domain and even if by chance he writes the same arrangement or expression, he, too, is an author. But the second may not copy the first's arrangement or expression. The Circuit Court of Appeals held nothing to the contrary.

In considering whether the so-called "similarities" were so striking as to have probative value on the issue of copy-

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\*The Missouri Court has phrased it that the creator of a *unique intellectual* production will be protected from unauthorized appropriation or conversion. *Kurfiss v. Cowherd*, 233 Mo. App. 397 (1938); *Brunner v. Stix, Baer & Fuller Co.*, 352 Mo. 1225 (1944).

ing, the Circuit Court noted that the "similarities" related to stock and commonplace matters in the public domain. It is well-settled that this fact is material to the issue of copying, since it serves to fortify the defendant's denial of access and copying. *Darrell v. Joe Morris Music Co.*, 113 F. (2d) 80 (C. C. A. 2nd, 1940).

For example, there is the old prohibition "gag" about a bootlegger concealing bottles of liquor in a baby carriage. No rational mind is forced to the inevitable conclusion that the only place defendant could have secured that idea was from plaintiff's unpublished manuscript. If others have written of the same matters without copying from the plaintiff, there is no reason to infer that the defendant copied such material from the plaintiff.

#### **FOURTH: THERE WAS NO FAILURE BY THE CIRCUIT COURT OF APPEALS TO COMPLY WITH RULE 52.**

In this case, neither the plaintiff nor any of the defendant's witnesses testified in open court. No witness testified in person at the trial on the issues of access or copying.

Only four "live" witnesses were called by plaintiff. One Dr. Wieman, a dentist, testified he had read a manuscript of the plaintiff in 1934 and 1936, and that Exhibit 1 told the same story as that which he had read five years before, but he could not and would not say it was the particular manuscript he had read five years before (R. 78-80). Mr. Phillips, a local publisher, testified he had read and marked for printing Exhibit 1—after it came back from California—and was explicit that when he saw it, it was a clean copy (R. 87) and not as it was when produced at the trial. Hubert Bauersachs testified he was plaintiff's friend and that he had told her some incidents of his life as a concert

violinist. Significantly, he said he had never read the manuscript (R. 88). The fourth witness, Gissler, only testified to the acknowledgment of the affidavit accompanying the plaintiff's manuscript when something was sent to the Library of Congress in 1934. He never read it (R. 93).

All the rest of the testimony was by deposition and documentary exhibits. On the main issues, there was no assessing by the District Court of the credibility of witnesses and acceptance or rejection of their testimony from their demeanor at the trial. The ultimate question of whether the defendant's motion picture is a pictorial representation of the plaintiff's novel and the question of whether the defendant copied the plaintiff's mode of expression are questions for the reviewing Court. *U. S. Fidelity Co. v. Bray*, 225 U. S. 205 (1911).

Certainly no court would consider itself bound by such findings of the District Court as the one that the defendant copied the idea of an Army Show and the singing of "Oh, How I Hate to Get Up in the Morning" from the plaintiff's unpublished novel, rather than from the famous Berlin show of World War I.

#### **FIFTH: THE PLAINTIFF FRAUDULENTLY IMPOSED UPON THE DISTRICT COURT AND THE DEFENDANT.**

In its motion to reopen the case, filed after the announcement of the District Court's opinion but before the entry of judgment, and in its motion for a new trial, the defendant cogently demonstrated that fraud had been practiced on the Court and the defendant.

(a) Exhibit 1, the manuscript said to have been copied from by defendant, was not the same as sent to Mr. D'Orsay in 1937 (R. 377, 1532, 1534). It con-

tains thousands of changes and alterations (R. 1624). When produced it was in great disarray and its present form is due to the industry of counsel. Some of it was typed and many changes in it were made after plaintiff saw defendant's motion picture in St. Louis in August, 1938 (R. 63, 143, 1624).

(b) Exhibit 1A, the Government application form and affidavit for registration of claim of copyright used by plaintiff in 1934 had been altered by erasure and addition.

(c) Exhibit 2, the Government rejection slip sent plaintiff by the Library of Congress has been erased by a chemical and a new title inserted.

(d) Exhibit 4, the note inclosed with the sealed copy is apocryphal. It could not have been written on the date it bears.

(e) Exhibit 5, the copy said to have been sealed from January 21, 1937, to June, 1941, contains alterations which conclusively demonstrate that whatever was in the "sealed" package, it was removed and this document inserted. At least 45 pages are on heavier and different paper from the rest of the volume. No one of these pages was typed consecutively after the page which precedes it or immediately prior to the page which follows it.

(f) The wrapper enclosing the sealed copy was destroyed or lost in plaintiff's attorney's office (R. 1418, 1627, 1892).

It is true that at the original hearings in December, 1942, and January, 1943, these matters were not pressed

upon the District Court. But they were before any judgment was ever entered, and the District Court should not have ignored them. *Hazel-Atlas Co. v. Hartford Co.*, 322 U. S. 238 (1944); *Precision Co. v. Automotive Co.*, 324 U. S. 806 (1945). The decision of the Circuit Court of Appeals dismissing the complaint made it unnecessary for it to consider these matters.

### **CONCLUSION**

This is simply a litigation between two citizens. No important question of law has been wrongly decided. There is no conflict of decisions between Circuit Courts. The Circuit Court of Appeals has correctly predicted and applied the Missouri law on every issue. The writ prayed should be denied.

Respectfully submitted.

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June 17, 1946.